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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellants respectfully submit this brief in opposition to the motion of the railroad appellees "that the rulings of the District Court upon which appellants have based their appeal be affirmed".

1. This Appeal Raises Substantial Questions as to Commission Jurisdiction to Make the Declaratory Order Under Review.

Appellees' argument concedes that a declaratory order under §5(d) of the Administrative Procedure Act can only be issued "within jurisdiction delegated to the agency" as provided in §9(a) of that Act. Appellees (as did the District Court) rely on §§13(1) and 16 of the Interstate Commerce Act as constituting such delegation, upon the theory that §1(11) of the Act imposes on every car-user a statutory duty to pay reasonable compensation for the cars of others.

In support of this theory they suggest (p. 6) that if the statute does not impose such a duty, the car-owner will have *no* enforceable right to compensation, ignoring the quasi-contractual obligation resting on the shoulders of everyone who uses the property of another to compensate the owner fairly therefor. §22(1) of the Act pertinently provides

> ". . . nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies".

In view of the clear and adequate remedy which the common law affords to all car owners, the intimation that a decision adverse to Commission jurisdiction would subject appellees' property to confiscation is not worthy of serious consideration.

Appellees' remaining argument on this question is based upon an attempted analogy to §1(4), which imposes the statutory duty on carriers establishing through routes "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto". They purport to find in this statutory direction the imposition on each through-route participant of a duty unilaterally to pay reasonable compensation to its fellow through-route participants,—a duty that is basically different from an obligation to act jointly with its fellow through-route participants in making pertinent rules and provisions in connection with their joint operation of through routes.

This attempted analogy completely ignores (as does appellees' argument) the very striking difference between §1(4) which expressly refers to "compensation" and §§1(10) and (11) which do not,—although significantly §1(14)(a) explicitly includes "compensation" among the subjects over which the Commission is given regulatory (*i.e.* prescriptive) power. The same argument was made

to this Court in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80 (1931), where it was contended that the operational duty imposed on carriers by §1(12) "to make just and reasonable distribution of cars for transportation of coal among the coal mines served" included compensation for the use of the coal cars. This Court rejected that argument.*

Moreover, with regard to §1(4) itself, appellees by asserting that an obligation *jointly to provide for* is an obligation *unilaterally to pay* are merely attempting to dispose of the question of what duty is imposed by §1(11) by assuming the answer to a similar question if asked with respect to §1(4); and the answer to that other question (*i.e.* what duties are imposed by §1(4)?) is not the answer which the appellees assume.

The reasoning by which appellees would support Commission jurisdiction under §1(4) to award reparation in respect of car-hire would equally support such jurisdiction in respect of divisions. Indeed, prior to the 1920 Act, divisions as well as car-hire fell under the identical clause of §1(4) on which appellees base their argument (*Morgantown and Kingwood Divisions,* 49 I. C. C. 540). It is well settled, however, that except as some other section of the Act may have been violated (*e.g.,* §3, *Western Pacific Railroad Co.* v. *Southern Pacific Co.,* 55 I. C. C. 71), the only jurisdiction enjoyed by the Commission over divisions before or since the 1920 Act is its regulatory (prescriptive) jurisdiction under §15 (*Brimstone Railroad Co.* v. *United States,* 276 U. S. 104, 121, 1928).

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* "The object of this provision was to insure a proportional distribution of all available coal cars so as to afford a fair and equal opportunity to each mine to enjoy their use on the basis of its rating. *Baltimore & O. R. Co.* v. *Lambert Run Coal Co.,* 267 Fed. 776, 779. It has nothing to do with the question of compensation for the use of cars by non-owning railroads. That subject, as already appears, is covered by §1(14)." *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80 at 99.

Appellees (p. 7) compare the car-owner seeking to collect car-hire to a shipper complaining of the exaction of unreasonable rates, but the analogy fails at one essential point. Where relations between carriers are involved, Congress has generally left them to be worked out in the first instance by mutual agreement (cf. §5a). If the carriers involved fail to reach mutual agreement, the Commission is not authorized to make an agreement for them; it exercises its regulatory power, explicitly granted under §15(3), to *establish* a through route, or to *prescribe* a division (*I. C. C.* v. *Columbus and Greenville Railway*, 319 U. S. 551, 555, 1943; *Brimstone Railroad Co.* v. *United States*, 276 U. S. 104, 1928). Appellees have suggested no reason why the same principles should not apply to car-hire and other like matters normally the subject of inter-carrier agreements.

The duty actually imposed by §1(11) is the duty to establish "just and reasonable rules, regulations, and practices with respect to car service" and to observe and enforce the same once they have been established. That Congress here had particularly in mind rules, regulations, and practices which affect shippers clearly appears from §1(13), which authorizes the Commission to require the same to be filed and incorporated in the respective carriers' "schedules showing rates, fares, and charges for transportation".

In *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C., 1947) the statutory Court in analyzing the scope of the Commission's rule-making powers under §1(14)(a), pointed out (at pp. 69, 71, 72) the differences in the statutory scheme between operational rules and rules establishing compensation,—the former affecting the public interest, the latter being purely inter-carrier.

The duty "to establish" is imposed by §1(11) on "every carrier by railroad"; that is, on each individual carrier. Insofar as the "rules, regulations and practices" involve a single railroad, they can, of course, be established by its

own unilateral action. But assuming, as appellees assume, that practices with respect to the payment of compensation between carriers are also impliedly included in §1(11), the only way such practices can be established is by agreement between the railroads involved, since neither car-owner nor car-user has the lawful power to do so unilaterally (cf. *Alton Railroad Co.* v. *United States*, 287 U. S. 229, 236, 1932).

Thus, whether or not the subject matter of compensation is to be read into §1(10)'s definition of "car service" and hence into the duties imposed on carriers by §1(11), the only way in which *any* car service rule or practice involving more than one carrier can be established under §1(11) is by mutual agreement and joint action of all of the carriers involved. And under §1(11) the duty resting on "every carrier" to establish "just and reasonable" rules and practices "with respect to car service" can only be the duty on every carrier individually to make a good faith effort to arrive at agreement and joint action with the other carriers involved;—failing the success of which the Commission has the power to step in and exercise its prescriptive rule-making authority under §1(14)(a) either on complaint or on its own initiative. But the Commission does not have the power,—as appellees argue it has,—to make the agreement for the carriers (or to determine by declaratory order the agreement which it thinks the carriers should have made, which is in substance the same thing).

The declaration of unlawfulness at the end of §1(11) subjects a violator to penal consequences under §10. Consequently appellees' assertion that a duty *jointly to establish* should be transformed by interpretation into a duty *unilaterally to pay* "would do violence to the well-established principle that penal statutes are to be construed strictly" even in a non-criminal case. (*FCC* v. *American Broadcasting Company*, 347 U. S. 284, 296, 1954.) This same principle applies to confirm the view that "compensation" is not to be read by implication into §1(11)'s im-

position on carriers of duties respecting the purely operational practices specified in §1(10).

So long as appellants adhered to the charges fixed under the §5a agreement, that agreement did establish their practices with respect to the payment of car-hire. But as soon as they gave notice that they were dissatisfied with the rates fixed under the industry agreement and would no longer be bound thereby, it ceased to be their agreement, or to establish their practices, in that regard.

That appellants have not succeeded in reaching separate agreements with appellees on car-hire is not due to any failure on appellants' part to perform their duty (if such there be) to make a good faith effort to reach agreement. Rather it is due to *appellees'* insistence that the car-hire charges fixed under the industry agreement shall be imposed on appellants not because *appellants* have agreed to them—the agreement itself, §5a(6) of the Act, and the complaint before the Commission make it abundantly clear that they have not—but because *appellees* have agreed to them (cf. *Alton Railroad Co.* v. *United States, supra,* 287 U. S. 229, 236).

The least that §5a(6) can mean is that appellees were not justified in this insistence,—and that it was they, not appellants, who failed to perform their duty, if any (respecting compensation under §1(11)), of attempting in good faith to achieve mutual agreement with appellants. And in any event (as pointed out above) such a failure, we submit, would not, and a *fortiori* would not *unquestionably,* ground a proceeding in reparation and thus serve as foundation for Commission jurisdiction in this case.

2. This Appeal Raises Substantial Questions as to Whether the Commission by Adjudicatory Order Can Declare that a Single Uniform Rate of Car Hire Not Theretofore Precribed by it is Binding on All Railroads.

Asserting that the Commission has jurisdiction to make a declaratory order in this proceeding, appellees also assert

that the Commission is authorized by such an order to enforce payment of the uniform car rental prices which they have fixed under their industry agreement, provided the Commission has found that those prices are "not in excess of reasonable compensation". This most clearly appears from the moving appellees' characterization (p. 12) of appellants as "railroads subject to the rate (when and if approved by the Commission)" which they have so fixed, and of the proceeding as one seeking Commission "review" of the charges so fixed. That the Commission and the District Court took the same view of the proceeding before the Commission, and gave their approval on that basis is not denied, and the Commission's conclusion,—upon which the District Court's holding of Commission jurisdiction is predicated,—namely, that the industry-fixed rates of rental charge are binding upon all users if "not in excess of reasonable", admits of no other interpretation.

Appellees' assumption (p. 12) that the Commission was "called upon to appraise" the car-hire charges fixed by *appellees,* as the criterion determinative of whether *appellants* had performed their statutory duty is, indeed, tantamount to an assumption that appellees, as the dominant segment of the industry, had regulatory power to fix the standards with which all others must comply, subject to Commission review in the same way that the Commission's orders are subject to review by a court.

Other questions arising in this connection are brushed aside or ignored by appellees and we deem it unnecessary here to add to what we have already said in our Jurisdictional Statement,—except that as to the Commission's lack of power to establish per diem charges retroactively, we further respectfully refer the Court to the concurring opinion of Commissioner Alldredge in *Alabama T. & N. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 274 I. C. C. 383 (1949), at pp. 399-400.

Appellees' statement (p. 11) that "the Commission's authority to prescribe and to adjudicate arises from the same source in the statute" emphasizes the fallacy under-

lying appellees' argument: it assumes that rule-making and adjudication are interchangeable functions and have interchangeable procedures, so that in an adversary adjudicatory proceeding the Commission can issue a declaratory order which will have the effect of prescribing rules, uniformly binding on those not parties to the proceeding before it as well as on those that are parties thereto, and imposing general duties for past, present and future alike. For it cannot be denied that the purpose and effect of the proceeding and of the Commission's order was to impose just such a rule, promulgated in the first instance not by the Commission but by the dominant industry group, and held by the Commission and the District Court to be binding on all—parties and non-parties alike, for past, present and future—strictly as a conclusion of law.

Whether or not such a result accords with the Congressional intent as expressed in the Administrative Procedure Act, we submit, is not only a substantial question, but a question of far-reaching implications in the field of administrative law.

3. This Appeal Raises Substantial Questions as to Whether the Commission Should Have Entertained this Proceeding.*

As we pointed out in our Jurisdictional Statement, this Court has never (to our knowledge) determined whether administrative agencies are subject to the same principle to which courts are subject under established law,—the principle that the judicial process should not be available to aid in furthering the objective of an unlawful combination or conspiracy.

The appellees sought by their complaint before the Commission an order declaring that the prices they had fixed required uniform observance by all railroads. If the im-

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* To the extent that this point asserts a violation of the Sherman Act by the moving appellees, the Long Island disassociates itself therefrom. See footnote on page 3 of our Jurisdictional Statement.

position on others than themselves of such collectively fixed prices is not exempted by statute it is clearly unlawful (*Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 1945; *United States* v. *Trenton Potteries Company*, 273 U. S. 392, 1926) and no Court would entertain a proceeding, the object of which was to enforce adherence to the prices so fixed (*Continental Wallpaper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 1909; *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384, 1951).

Whether this attempt by appellees to force observance by others of their fixed prices was lawful or unlawful requires scrutiny of the exempting provision, §5a(9) of the Interstate Commerce Act. By that section antitrust exemption is afforded to the parties to an ICC-approved industry price-fixing agreement in two different respects only:

(i) "with respect to the making of such agreement", and

(ii) "with respect to the carrying out of such agreement in conformity with its provisions".

Appellees obviously are exempted with respect to their making the agreement under (i) above. But appellees (and the District Court) ignore the limitation imposed upon the second of the above specified exemptions. They conclude (as did the Commission) that the making of the agreement, which gave lip service to the reservation of the "free and unrestrained right to take independent action" (required by Section 5a(6)), was all that the Congressional intent was concerned with. But the very precise exemptive language of §5a(9) shows that Congress intended that the parties to a Commission-approved price-fixing agreement should be exempt from antitrust law application with respect to their conduct under said agreement only to the extent that they are engaged in "carrying out" their agreement "in conformity with its provisions".

The record shows that the price fixing-roads intended that the prices they fixed under their agreement should be

binding on all roads, regardless of,—indeed in defiance of,—Article XII of that agreement, which accords to all parties "the free and unrestrained right to take independent action" required by §5a(6). (cf. *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384, 1951). They attempted coercive measures to attain that result. When these attempts failed, they sought Commission aid to accomplish and implement that objective. Asserting in their complaint that the appellants had refused to pay the prices appellees had fixed under their agreement, they asked that the Commission not only declare that their fixed prices were "not in excess of reasonable" but also that those prices required "uniform observance" by these appellants and all other roads.

This prayer put the Commission squarely on notice that what the appellee's were asking for was *not* "in conformity with"—indeed that it was directly contrary to—the provisions of their agreement. And in their principal brief to the Commission appellees again confirmed this to the Commission (see p. 13 of our Jurisdictional Statement). Nevertheless the Commission entertained the proceeding and granted the relief requested, thus effectuating the railroad-appellees' avowed objective of imposing their price-fixing determinations upon all railroads.

The Commission based its order solely on its unsupported conclusion of law that, since the industry-fixed prices were "not in excess of reasonable compensation", "It necessarily follows that lower charges . . . would not be compensatory, either at present or in the past". This legal conclusion of the Commission underlies the District Court's holding that (in the absence of mutual agreement between the roads involved) the rental-debtor roads must pay such amount of car-hire as the rental-creditor roads collectively fix, provided only that the amount so fixed does not exceed the maximum limits of "reasonable compensation".

Moving appellees argue (p. 12) that "It is wholly irrelevant that a past rate which the Commission is called

upon to appraise originated through the industry's rate making procedures rather than by Commission prescription, or that some of the railroads subject to the rate (when and if approved by the Commission) withheld their assent from its original establishment". Not only does this argument again wholly equate quasi-legislative with quasi-judicial functions and ignore the substantive and procedural differences between them which Congress explicitly specified in §§2(c)(d), 4 and 5 of the Administrative Procedure Act, but it also entirely ignores the detailed and specific limitation Congress took pains to place upon the antitrust exemption which by §5a(9) it accorded to railroads, parties to a Commission-approved agreement, as to their conduct thereunder.

It is respectfully submitted that if the statutorily-reserved right of non-assenters "to take independent action" with respect to prices collectively fixed is thus to be stripped of all substance by Commission and District Court decision, that is a substantial question which should be passed upon by this Court.

Appellees argue (p. 12) that the Commission "was the one agency of Government having primary jurisdiction of the subject matter and power through its decision to protect the 'car users' from the price-fixing conspiracy charged to exist". In this proceeding, under the view taken by the Commission and approved by the District Court, the Commission has no power to protect appellants from the results of a price-fixing combination except only to the extent that the prices fixed by that combination exceed the maximum limits of the zone of reasonableness and thus no power to afford relief from a conspiracy to manipulate car-hire charges within that zone (cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 460-461, 1945). As to the zone here, the Commission itself said in 1949, "there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate". (*Alabama T. & N. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 274 ICC 383 at 389, 1949).

CONCLUSION

The motion to affirm should be denied.

Respectfully submitted,

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